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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Children's Television Obligations)
Of Digital Television Broadcasters)

MM Docket No. 00-167 /

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

Henry L. Baumann
Jack N. Goodman
Valerie Schulte
Ann Zuvekas
COUNSEL

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, NW
Washington, DC 20036

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TABLE OF CONTENTS

Executive Summary	i
I. INTRODUCTION.....	1
II. THE IMPOSITION OF ADDITIONAL PUBLIC INTEREST OBLIGATIONS ON DIGITAL BROADCASTERS IS PREMATURE.....	3
A. The Commission Should Stand Back and Allow Broadcasters to Provide Programming in a Variety of Formats.....	5
B. Disparate Regulatory Treatment Could Stifle Innovative Digital Technology.....	6
III. THERE IS NO DEMONSTRATION OF NEED SUFFICIENT TO CHANGE THE AGREED-UPON THREE HOUR RULE.....	8
A. The Need For Additional Content Regulation Has Not Been Shown.....	8
B. The Commission Should Not Abandon The Agreed-Upon Three Hour Rule.....	10
C. New Children’s Programming Requirements Are Unlikely to Pass Judicial Scrutiny.....	11
IV. ANCILLARY AND SUPPLEMENTAL SERVICES ARE NOT SUBJECT TO PUBLIC INTEREST OBLIGATIONS.....	16
V. PUBLIC INFORMATION INITIATIVES ARE VOLUNTARILY BEING UNDERTAKEN BY BROADCASTERS.....	19
VI. THE COMMISSION SHOULD NOT ALTER ITS DEFINITION OF COMMERCIAL MATTER.....	21
A. The Commission Should Continue to Exempt Promotions, Public Service Announcements (PSAs) and Educational Paid-For PSAs From Its Definition Of Commercial Matter.....	21
B. It Is Premature To Determine How to Treat Interactive Television.....	23
VII. THE CURRENT VOLUNTARY RATINGS SYSTEM SHOULD REMAIN UNCHANGED.....	24
VIII. ALTERING OF PREEMPTION POLICIES WOULD BE PREMATURE.....	27
IX. CONCLUSION.....	28

EXECUTIVE SUMMARY

The National Association Broadcasters hereby files comments on the issues raised in the Commission's *Notice* on children's television obligations in the digital television (DTV) world. Broadcasters will continue, as they transition to DTV, their commitment to providing quality children's educational and informational programming. Digital broadcasting, however, is still in its infancy, and in many markets is still struggling to be born. Thus, NAB strongly urges the Commission to focus its attention on resolving several outstanding digital transition issues, *before* it considers imposing additional programming obligations on digital broadcasters.

At the same time the Commission grapples with the outstanding issues of cable compatibility, digital must carry and technical standards, it should encourage broadcasters to join in jump-starting the digital transition by attracting viewers of all audiences, including children. NAB asserts that the transition to digital broadcasting does not, in itself, warrant the imposition of additional obligations. Further, the imposition of such *additional* programming obligations on a nascent DTV technology is premature and could stifle development and diversification of innovative digital services, including providing multicasting of programming streams, such as movie channels, datacasting, or niche programming, which may or may not be conducive to children's programming. The Commission should also not dictate the technical format in which broadcasters provide core programming. Such a requirement would be contrary to the Commission's policy of allowing broadcasters the flexibility for marketplace experimentation, for many, or all, broadcasters may ultimately choose not to multicast at all. Indeed, it as yet remains unknown whether multicasting, datacasting and subscription based services will even be viable commercially.

Moreover, the Commission has not demonstrated that broadcasters are failing to meet their children's programming obligations as articulated by the Children's Television Act (CTA) and the Commission's Rules. To date, the Commission has not found violations of or noncompliance with the programming mandate. Further, the Commission should not abandon the three-hour rule, agreed upon by the Administration, advocacy groups, NAB and the Commission. In 1996 NAB accepted specific new rules defining and quantifying broadcasters' children's television programming obligation on the understanding that the requirement would not be increased beyond the agreed three hours per week of "core" programming. We believed then, and we believe now, that government rules requiring specific amounts of specifically defined programming violate the First Amendment. So too does NAB believe that Congress, in adopting the Children's Television Act, expressly and intentionally legislated a specific but unquantified children's programming obligation and intended broad broadcaster discretion as to compliance. In support of NAB's firm opposition to any increase in the number of required hours of "core" children's programming, NAB discusses and attaches a statement prepared for NAB in 1995 by Professor Rodney A. Smolla of the Institute of Bill of Rights Law at the Law School of The College of William and Mary analyzing the Commission's 1995 proposals requiring licensees to air specific amounts of defined children's programming in light of the established First Amendment principles governing regulation of broadcasting. This statement is attached here as Appendix B. He concluded that the adoption of either the proposed processing guidelines or the mandatory programming standard, together with the proposed new definition of qualifying programming, would violate the First Amendment.

As to ancillary or supplementary services, NAB believes that such services offered by DTV broadcasters should be subject only to the same public interest obligations as comparable services offered by non-broadcasters. The Commission has already expressly determined that subscription video services are not broadcasting services subject to Title III broadcasting obligations.

NAB is pleased to announce it is launching a campaign -- *Getting The Word Out: NAB Action Kit On Children's Programming* -- to help broadcasters better promote educational and informational programming, which will further the Commission's goal of promoting educational and informational children's shows. It is in the best interests of broadcasters to better, and voluntarily, promote their core programming in order to build a significant audience and improve their core programming ratings.

The Commission should refrain from altering its preemption and promotion policies and its definition of commercial matter until such time as the digital landscape of broadcast television becomes better defined. It is simply premature for the Commission to revise its policies on preemptions in children's core programming based on mere speculation of what may or could be offered with digital broadcasting. Once the digital conversion has occurred and programming options have settled out, it may be appropriate for the Commission to revisit the issue of how to handle preemptions. NAB also strongly urges the Commission to continue to exempt late breaking news from its core-programming preemption practices. The Commission should continue to rely on the good-faith journalistic discretion of broadcasters to determine whether to preempt *any* programming with news alerts.

As to the definition of commercial matter, the Commission should continue to exclude promotions, public service announcements (PSAs) and educational paid-for PSAs from its

definition of commercial matter. For the same reasons these “interruptions” were originally excluded from the commercial matter rule, they should remain excluded from the category of commercial matter: they are either not paid for and therefore do not fall within the definition of commercial matter directed to be adopted by the CTA or they should be encouraged to be broadcast by not being subjected to commercial limits. As the interactivity of television with websites is still in its infancy, and not yet available through digital over-the-air broadcast streams, it is simply too early in the digital era to attempt to forecast what types of interactive links may develop and which should be disallowed or otherwise restricted for use in children’s broadcast programming. Moreover, to consider government regulation now for one potential access point (broadcast television) to the converging, linked media future is premature and unwise. NAB urges the Commission to let the various Internet technologies flower before deciding which parts to clip off for child audiences.

Finally, NAB believes that the suggestion to alter the current voluntary ratings system would only serve to delay needlessly the introduction of digital televisions with V-Chip technology. The alteration of the current ratings system would serve only to stall the current installation of V-Chips in DTV sets and delay the overall introduction of V-Chips in the digital marketplace. For analog televisions, changing the ratings system and the V-chip would be enormously disruptive to consumers. NAB also notes the inherent contradictions of proposals suggesting any *required* changes to a *voluntary* ratings system. NAB submits that the Commission lacks the authority to specify changes to the current voluntary system and to require broadcasters to institute those changes. We are and remain confident that the voluntary restraints adopted by the motion picture industry are a clear indication that the industry is taking

steps to voluntarily refrain from promoting age-inappropriate materials during children's television programming.

For the reasons discussed above, NAB requests that the Commission delay its examination of children's television obligations of digital television broadcasters until the conversion to digital television is complete.

**Before the
Federal Communications Commission
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Children's Television Obligations)	MM Docket No. 00-167
Of Digital Television Broadcasters)	

TO: The Commission

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

I. INTRODUCTION.

The National Association of Broadcasters (NAB)¹ hereby files comments in the above-referenced proceeding on children's television obligations in the digital television (DTV) world.² Broadcasters will continue, as they transition to DTV, their commitment to providing quality children's educational and informational programming. Simultaneously with their on-going efforts to serve children, broadcasters are striving to insure a timely deployment of digital technology. To date, over 166 DTV stations are on-air, of which 69 stations are ahead of their scheduled May 1, 2002 build-out deadline.

Digital broadcasting, however, is still in its infancy, and in many markets is still struggling to be born. Thus, NAB strongly urges the Commission to focus its attention on resolving several outstanding digital transition issues *before* it considers imposing additional

¹ NAB is a nonprofit incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry.

² *Notice of Proposed Rulemaking*, In the Matter of Children's Television Obligations of Digital Television Broadcasters, MM Docket No. 00-167 (released October 5, 2000) (hereinafter *Notice*).

programming obligations on digital broadcasters. As we noted in the Commission's Biennial Review of the conversion to digital television, if the Commission does not act quickly to mandate inter-operability and other technical standards, adopt DTV must carry rules, require DTV receiver performance standards, and require DTV tuners in every new television receiver sold, the transition will remain adrift and is likely to stall.³ The Commission must no longer ignore these key elements necessary to a successful conversion. Thus, as an initial matter, and as discussed in Section II, NAB believes that the imposition of *additional* programming obligations on a nascent DTV technology is premature and could stifle development and diversification of innovative digital services.

Secondly, the Commission has not demonstrated that broadcasters are failing to meet their children's programming obligations as articulated by the Children's Television Act (CTA) and the Commission's Rules.⁴ Thirdly, NAB is launching a campaign to help broadcasters better promote educational and informational (E/I) programming, which will further the Commission's goal of promoting educational and informational children's shows. Finally, the Commission should refrain from altering its preemption and promotion policies and its definition of commercial matter until such time as the digital landscape of broadcast television becomes better defined.

³ See *Comments of NAB*, In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MM Docket No. 00-39, (May 17, 2000) at 2-3.

⁴ Children's Television Act of 1990, Pub.L. No. 101-437, 104 Stat. 996-1000, *codified* at 47 U.S.C. §§ 303a, 303b, 394; *Report and Order*, In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 93-48, rel. Aug. 8, 1996 at ¶ 24 (hereinafter *1996 Report and Order*).

II. THE IMPOSITION OF ADDITIONAL PUBLIC INTEREST OBLIGATIONS ON DIGITAL BROADCASTERS IS PREMATURE.

The Commission seeks comment on how it should “adapt” children’s television obligations to digital broadcasting. *Notice* at ¶ 10. NAB asserts that the transition to digital broadcasting does not, in itself, warrant such an “adaptation” or imposition of additional obligations. In establishing the statutory framework for the transition to DTV, Congress made clear in Section 336 of the Communications Act that television broadcast stations in the digital environment remain obligated “to serve the public interest, convenience, and necessity.” 47 U.S.C. § 336(d). And in implementing Section 336, the Commission put broadcast licensees on notice “that existing public interest requirements continue to apply” to them.⁵ These public interest requirements have traditionally been applied to broadcasters providing a single analog signal carrying one video program. As discussed herein, the Commission’s question of how these public interest programming duties should apply in a digital environment is premature. Digital broadcasters will indeed have the ability and option to multicast (*i.e.*, broadcast several video programming streams on a single digital channel). How then, the Commission asks, with regard to multicasting, should a licensee’s children’s public interest obligations be applied? Is it to the DTV channel as a whole, or instead to each program stream offered by the licensee? NAB believes it makes little sense to require a broadcaster to air children’s programming on specialized streams devoted to business news, sports, or datacasting. Children’s public interest

⁵ *Fifth Report and Order*, In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service, MM Docket No. 87-268, 12 FCC Rcd 12809, 12830 (1997)) (hereinafter *Fifth Report and Order*). Thus, DTV broadcasters must, for example, air programming responsive to their communities of license, comply with the statutory requirements concerning political advertising and candidate access, and provide children’s educational programming.

obligations simply should not be required on the specialized program streams that a broadcaster might offer where children are not the intended audience. And, conversely, broadcasters may find that the marketplace will support the devotion of a specialized children's educational and informational core programming stream. *See Notice* at ¶ 20. But digital broadcasters should be allowed to experiment, not saddled with new programming mandates, to find the public's interest in new programming alternatives, including those serving child audiences.

For as NAB told the Commission earlier this year, the application of public interest duties, including children's television programming obligations, to multicast programs remains entirely theoretical at this time. Many, or all, broadcasters may ultimately choose not to multicast at all.⁶ If instead a broadcaster chooses to air one HDTV signal, then there is no rationale which supports the "altering" of a broadcaster's public interest obligations. The mere digital enhancement and improved quality of a broadcast signal by no means warrants a change in public interest obligations. Further, the Commission should not dictate the technical format in which broadcasters provide core programming. *Notice* at ¶ 18. Such a requirement is contrary to the Commission's policy of allowing broadcasters the flexibility for marketplace experimentation.⁷

Moreover, as the Commission recognizes, broadcasters might choose to multicast multiple standard definition program streams during only part of the day and broadcast a single HDTV signal at other times (such as prime time). *See Notice* at ¶ 17. It is simply premature for the Commission to "alter" children's programming obligations, be it based on a proportional hour basis, a "Pay or Play" basis, or on a menu approach, until such rules can reflect the actual

⁶ Comments of NAB, *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, March 27, 2000 at 16-17.

⁷ *Fifth Report and Order*, 12 FCC Rcd at 12810.

services offered by broadcasters. *Notice* at ¶¶ 15-21. Devising or adopting any of these schemes would be extremely complex, require a great deal of Commission resources, and may have the effect of discouraging programming innovation.

Indeed, it as yet remains unknown whether multicasting will even be viable commercially. Such splitting of a broadcaster's programming streams may, in fact, only divide a station's existing audience, rather than increase it, in which case advertiser-supported multicasting would have no additional revenue producing potential.⁸ It also remains unclear whether datacasting and subscription based services are commercially viable. Again, the imposition of additional children's programming obligations is premature until the digital landscape, in all of its variables, becomes better defined.

A. The Commission Should Stand Back and Allow Broadcasters to Provide Programming in a Variety of Formats.

The Commission has previously recognized that audiences benefit by an increased diversity of program offerings across the market and that individual stations do not necessarily need to present programming of all types.⁹ Given the difficulty that lower-rated, unaffiliated and/or less profitable stations may have bearing the costs of converting to digital technology, the Commission should not compound these problems by requiring DTV broadcasters to air more children's core programming, and on every video stream. Instead, as discussed in Section III-A, the increasingly competitive media marketplace, including other media not regulated by quantified requirements, is insuring that the educational and informational needs of children are

⁸ See Advisory Committee Report on Public Interest Obligations of Digital Television Broadcasters, Final Report at 54 (1998) ("it is conceivable that broadcasters who apply multiplexing will simply cannibalize their single signal, achieving no additional revenues or perhaps merely stabilizing current market share").

⁹ See *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087-88 (1984).

served. At the same time the Commission grapples with the outstanding issues of cable compatibility, digital must carry and technical standards, it should encourage broadcasters to join in jump-starting the digital transition by attracting viewers of all audiences, including children. Broadcasters, who are investing billions of dollars in their digital conversion, should be allowed the flexibility to attract audiences for their digital products. This may include providing multicasting of programming streams, such as movie channels, datacasting, or niche programming, that are not conducive to children's television programming. This may also allow for the innovation of programming or dedicated channels targeted to meet the educational needs of children.

Just as "Congress intended to allow broadcasters flexibility" in meeting their public interest obligations to children¹⁰ in the analog environment, so too should the Commission allow flexibility during the conversion to digital technology. NAB contends that it is the end, not the beginning, of the conversion that is the appropriate time for the Commission to evaluate digital broadcasters' children's television programming obligations.

B. Disparate Regulatory Treatment Could Stifle Innovative Digital Technology.

Were the Commission to impose new, additional public interest obligations on digital technology *before* the end of the conversion, the resulting disparate regulatory treatment among video programming providers could stifle broadcaster experimentation with innovative DTV technology. The Commission has recognized that "it is desirable to encourage broadcasters to offer digital television as soon as possible," given the "intense competition in video

¹⁰ 1996 Report and Order at ¶ 24. See also 136 Cong. Rec. S10121 (daily ed. July 19, 1990) (Remarks of Senator Inouye).

programming.”¹¹ The Commission, however, proposes to undermine such encouragement by burdening a new technology with content and speech restrictions. The imminent and natural convergence in telecommunications technology should be accompanied by a convergence in regulatory treatment. Indeed, Chairman Kennard has envisioned such a convergence in his five year strategic plan: “[t]he advent of Internet-based and other new technology-driven communications will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As result, over the next five years, the FCC must wisely manage the transition from an industry regulator to market facilitator.”¹² The need for direct regulation of broadcasters should be reduced, not increased.

Further, the Commission should remain flexible in its Rules to allow digital broadcasters ample room to foster new technology and for the marketplace to determine niche audiences. If, for example, multicasting does increase the total number of programming options available to viewers, including children, then it becomes less necessary for each programming stream to carry all types of public interest programming. In a diverse multicasting environment, viewers will benefit from the increased number and variety of programming offerings across the market, and the Commission should be less concerned with insuring that every single programming stream offers every category of programming.¹³ However, were the Commission to impose

¹¹ *Fifth Report and Order*, 12 FCC Rcd at 12812.

¹² FCC, Report Card on Implementation of the Chairman’s Draft Strategic Plan at 1 (March 2000).

¹³ In previously eliminating quantitative programming guidelines for both television and radio stations, the Commission similarly recognized that audiences benefited by an increased diversity of program offerings across the market and that individual stations did not necessarily need to present programming of all types. *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087-88 (1984).

additional children's programming requirements on every digital stream, such inflexible regulations could discourage broadcasters from engaging in innovative multicasting services.¹⁴

III. THERE IS NO DEMONSTRATION OF NEED SUFFICIENT TO CHANGE THE AGREED-UPON THREE HOUR RULE.

The Commission has launched a proceeding and has proffered proposals to consider expanding the three-hour "core" children's programming mandate. But it has no evidence before it that broadcasters are not meeting the programming mandate of the CTA or that there is, otherwise, a need for increasing the three hour requirement. Nor is there a need to abandon the agreed-upon three hour rule, which NAB acceded to, despite its certain constitutional failings.

A. The Need For Additional Content Regulation Has Not Been Shown.

In its *1996 Report and Order*, the Commission stated that in its three year review it would "take appropriate action as necessary to ensure that stations are complying with the rules and guidelines adopted in 1996." *1996 Report and Order* at ¶ 140. Notably absent from the instant record is evidence demonstrating that there has been any failure by commercial television stations to meet Congress' or the Commission's directives as to educational and informational programming. To the contrary, broadcasters are meeting their three hour core program requirements. To date, the Commission has not found violations of or noncompliance with the programming mandate of the CTA and the Commission's implementing rules.

The instant *Notice* instead seems to be a solution in search of a problem. The Commission can justify new obligations only if evidence demonstrates that existing public

¹⁴ For example, a broadcaster considering whether to engage in multicasting (or whether to use its digital spectrum in some other manner) might be reluctant to offer three, four or five programming streams, if that tripled, quadrupled or quintupled its children's programming requirements.

interest standards are inadequate and that increased obligations would address these inadequacies.¹⁵ And, even with a demonstration of need, it is questionable whether the program mandates are permitted at all. Thus, the question should be not what additional content regulations can be required of broadcasters, but, rather, are broadcasters meeting their public interest obligations with respect to children's educational and informational programming? NAB asserts that the answer to the latter question is an affirmative yes.

NAB reminds the Commission that the three-hour quantified programming requirement, together with the processing guidelines, were implemented in order to "provide certainty for broadcasters about how to comply with the CTA." *1996 Report and Order* at ¶ 4. Simply stated, the *1996 Report and Order* and its accompanying processing guidelines were intended to "provide a means by which a broadcaster can be certain that our staff will be in a position to process its renewal application without further review of the broadcaster's CTA efforts." *Id.* Broadcasters have met and continue to meet their children's educational and informational programming obligations. While the Commission has a long-standing policy that broadcasters have a "special obligation"¹⁶ to serve children, this obligation is not a carte blanche for ever-expanding public interest requirements. The Commission must show a need for increasing obligations, and then assess the relative costs and benefits of expanding its public interest mandates. And, unless the Commission can demonstrate that the benefits generated by

¹⁵ See, e.g., *ALLTEL Corporation v. FCC*, 838 F.2d 551, 559 (D.C. Cir.1988) (court found a Commission rule affecting the determination of certain costs of local exchange carriers to be arbitrary and capricious, because the Commission's decision had "no relationship to the underlying regulatory problem").

¹⁶ *Children's Television Report and Policy Statement*, 50 FCC 2d 1 (1974), *aff'd sub nom. Action for Children's Television v. FCC*, 564 F.2d 458 (D.C.Cir. 1977) ("*1974 Policy Statement*").

its proposals are sufficient to justify the costs imposed on broadcasters, then the Commission must refrain from imposing additional public interest obligations.

B. The Commission Should Not Abandon The Agreed-Upon Three Hour Rule.

The Administration, advocacy groups, the Commission and NAB deliberated long and hard about quantifying children’s educational and informational programming requirements for broadcast television. The result of these collaborative deliberations was the promulgation of the three-hour core programming requirement and its accompanying processing guidelines. As the Commission noted in its *1996 Report and Order*, “the actions we take here are consistent with a proposal submitted by President Clinton on behalf of ‘a group including educators, child advocates, and broadcast industry representatives’ The National Association of Broadcasters (“NAB”) participated in this group and submitted the identical proposal in supplemental comments.”¹⁷ NAB, in a letter to President Clinton setting out the terms of the agreement between broadcasters and the White House, indicated that it would not object to the constitutional validity of the proposed three-hour programming requirements, based on NAB’s understanding that there would be no increase in quantified “core” hours.¹⁸ Yet the instant *Notice* contends that, because of the digital conversion, the Commission should “adapt” its policies. *Id.* at ¶ 12.

Thus, the triggering mechanism for adding to the public interest obligations of broadcasters is the change of technology and not a studied review of whether the needs of children are being served by the Rules set forth in the *1996 Report and Order*. Educating and

¹⁷ *1996 Report and Order* at fn. 7, quoting Letter from President Clinton to Chairman Reed Hundt (July 31, 1996).

¹⁸ Letter from Edward O. Fritts to President William J. Clinton, July 28, 1996, attached as Appendix A.

informing children is a laudable goal, one that broadcasters and the Commission share. This purported “adaptation,” however, is simply not warranted solely on the basis of the digital conversion, for “it is not sufficient for a regulation to articulate desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates; furthermore, if the goals could be achieved in a less costly manner, then the latter should be the approach selected.”¹⁹ Further, the Commission entirely fails to set forth any reason why the terms of the agreement that led to the 1996 Rules should be altered.

C. New Children’s Programming Requirements Are Unlikely to Pass Judicial Scrutiny.

As noted in the above section, NAB accepted specific new rules defining and quantifying broadcasters’ children’s television programming obligation on the understanding that the requirement would not be increased beyond the agreed three hours per week of “core” programming. NAB agreed then not to challenge in court this, the first ever, quantification of specifically required programming, based on this understanding. We believed then, and we believe now, that government rules requiring specific amounts of specifically defined programming violate the First Amendment. So too does NAB believe that Congress, in adopting the Children’s Television Act, expressly and intentionally legislated a specific but unquantified children’s programming obligation and intended broad broadcaster discretion as to compliance.

In 1995, the Commission’s Notice of Proposed Rulemaking in the children’s television proceeding²⁰ proposed rules similar to those ultimately adopted pursuant to the deliberations

¹⁹ T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 309 (1994).

²⁰ *Notice of Proposed Rulemaking* in MM Docket No. 93-48, 10 FCC Rcd 6308 (1995).

described above. There, the Commission quite appropriately recognized that there is a serious question about the Commission's power under the First Amendment to adopt such rules.²¹

Because this unprecedented extension of the Commission's power over the content of the programs on broadcast stations does raise exceptionally broad questions under the First Amendment, NAB then asked Professor Rodney A. Smolla of the Institute of Bill of Rights Law at the Law School of The College of William and Mary to analyze the Commission's 1995 proposals in light of the established First Amendment principles governing regulation of broadcasting. Professor Smolla is a noted First Amendment scholar.²² Indeed, the Commission has in the past relied on Professor Smolla's views in assessing regulatory alternatives. *See Implementation of Section 4(g) of the Cable Act of 1992* (Home Shopping Issues), 8 FCC Rcd 5321, 5328-29 (1993).

Professor Smolla's statement was attached to NAB's 1995 Comments and is attached here as Appendix B. He concluded that the adoption of either the proposed processing guidelines or the mandatory programming standard, together with the proposed new definition of qualifying programming, would violate the First Amendment. It should be carefully noted that Professor Smolla reached this conclusion based on an analysis of the cases that have permitted some abridgment in broadcast regulation of the normal First Amendment standards. He notes (Statement at 7 n.5) that the teachings of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and its progeny have indeed come under increasing criticism, but his analysis assumed their continuing validity. Of course, were *Red Lion* overruled or narrowed and broadcast regulation judged under the First Amendment standards applicable to all other media, the

²¹ *Id.* at ¶¶ 66-73.

²² Professor Smolla's credentials and extensive publications in the First Amendment area are described at pages 1-2 of his Statement.

conclusion that the Commission's proposed rules run afoul of the First Amendment would be even more compelling.

Professor Smolla first examined the Commission's proffered justification for imposing government speech requirements on broadcasters. In the *1995 Notice* (§ 53), the Commission suggested that new regulations were needed because it appeared that the workings of the marketplace have not produced a desired amount of educational and informational programming for children. A marketplace failure, however, even if it were proven to exist, cannot support the abridgment of broadcasters' First Amendment freedoms.

Professor Smolla pointed out (Statement at 5-6) that in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 662 (1994), the Solicitor General argued that the holding in *Red Lion* should be viewed as based on a finding of "market dysfunction." The Supreme Court directly rejected this argument, holding that its broadcast jurisprudence was grounded solely in spectrum scarcity -- "the special physical characteristics of broadcast transmissions." *Id.* at 2457. The Constitution does not permit the government to dictate speech based on a perceived market failure. Thus, Professor Smolla concluded that "the Commission's entire agenda in these proceedings is grounded in a purpose that the Constitution does not allow it to entertain." Statement at 6.

Professor Smolla next considered whether the proposed children's programming regulations could be sustained under the *Red Lion* spectrum scarcity rationale. The Supreme Court's broadcast cases have permitted a *limited* intrusion into licensees' editorial discretion to ensure balance in the presentation of views on issues of public controversy. Nothing in the *Red Lion* cases has permitted the Commission to impose specific affirmative programming obligations on licensees to advance views of the government's choosing. Indeed, the Supreme Court has stressed to the contrary that "broadcasters are engaged in a vital and independent form

of communicative activity.” *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984). The government’s interest in ensuring presentation of a diversity of viewpoints does not, the Court has held, “impair the discretion of broadcasters . . . to carry any particular type of programming.” *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). The Commission’s proposals in this proceeding thus find no support in the cases that have upheld very restricted regulation of broadcast speech.

Had there been any doubt that the Commission’s proposals could not be sustained under the Supreme Court’s broadcast jurisprudence, Professor Smolla pointed out (*id.* at 10-14) that the Court’s opinion in *Turner Broadcasting* explicitly concluded that the Commission does *not* have the authority to impose particular programming obligations. Reviewing its broadcast First Amendment decisions, the Court stated:

“In particular, the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although ‘the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.’”²³

Thus, *Turner* categorically rejected the notion that the Commission had the authority to do what it proposes to do here — define a particular type of programming that broadcasters must air.

Smolla found no support, therefore, for the Commission’s children’s television mandates in the Supreme Court’s broadcast cases.

He then examined the proposals under traditional First Amendment standards. Professor Smolla pointed out that at the core of the First Amendment is the principle that speakers have the right to choose what to say and what not to say. But in 1995, the Supreme Court again squarely

²³ 512 U.S. at 650, *quoting* Network Programming Inquiry, 25 Fed. Reg. 7293 (1960).

rejected arguments that private speakers could be required to express ideas approved by the government:

“The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”

Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 579

(1995). Thus, even though providing increased educational resources for children may be an important government objective, the Commission cannot seek to achieve it by dictating the speech of private broadcasters.

Moreover, the Commission cannot base affirmative programming obligations on cases that recognized the government’s interest in protecting children from harmful speech. While the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upheld rules that barred certain speech during times when children were likely to be in the audience, Smolla noted that *Pacifica* “provides no support for affirmative requirements imposing on broadcasters actual obligations to attempt to reach children with certain defined types of programming.” Statement at 18.

Even if the Constitution permitted -- which it does not -- the sort of affirmative speech requirements that the Commission requires if a compelling showing of need for such regulations were established, such a showing has not been advanced in this proceeding. The evidence in the record fails to demonstrate conclusively that there has been any overall failure by commercial television stations to meet Congress’ directives in the CTA. In *Turner Broadcasting*, the Court required the government to do more than simply “‘posit the existence of the disease sought to be cured’” in order to uphold the limited intrusion into cable operators’ speech rights at issue there.

114 S. Ct. at 2470, quoting *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Finally, Professor Smolla examined the legislative history of the CTA. The sponsors of the Act, he found, repeatedly stated that they did *not* intend that the FCC impose rules requiring specific quantities of particular types of programming. The Supreme Court has made clear that, when an agency adopts rules that raise serious First Amendment concerns, the courts should not approve such rules in the absence of a clear Congressional mandate for that position. While it is always true that the courts will construe an agency's authorizing statute to avoid serious constitutional problems, that rule — Professor Smolla noted — is particularly applicable when a rule affects First Amendment freedoms. *See National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

Thus, any increase in mandated “core” hours would not survive judicial scrutiny. The Commission may take steps to encourage the creation and airing of more and better educational and informational programming for children. It may review, as the CTA provides, stations' programming efforts at renewal time. But it cannot impose additional hours of required and defined children's programming and remain true to our core constitutional values. The Commission therefore should not further consider proposals to increase the “core” programming requirement.

IV. ANCILLARY AND SUPPLEMENTAL SERVICES ARE NOT SUBJECT TO PUBLIC INTEREST OBLIGATIONS.

The Commission seeks comment on whether it should impose children's programming requirements on ancillary and supplementary services such as subscription video streaming or datacasting. *Notice* at ¶ 15. The Commission determined that DTV broadcasters must pay fees

representing five percent of gross revenues received from ancillary or supplementary uses of the DTV spectrum for which broadcasters receive compensation other than advertising revenues used to support broadcasting. *Report and Order* in MM Docket No. 97-247, FCC 98-303 (1998).

The Commission has already expressly determined that subscription video services are not broadcasting services subject to Title III broadcasting obligations. In its *Subscription Video Order*, the Commission specifically recognized that “classification of subscription program services as non-broadcast will have other regulatory consequences,” including taking “such services out of the purview of sections 315 and 312(a)(7) of the Communications Act.” *In the Matter of Subscription Video*, 2 FCC Rcd 1001,1005 (1987). This decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C.Cir. 1988). The Commission’s long-standing treatment of subscription video services as non-broadcasting services that are not subject to Title III obligations would logically extend to any subscription service a digital broadcaster would offer.

Secondly, providers of DTV ancillary or supplementary services should not be treated disparately from those licensees offering the same services who got their licenses by auction. The Telecommunications Act of 1996 (“1996 Act”) was designed by Congress to end the barriers between various technologies and industries. In implementing Section 336, the Commission determined to “allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services.”²⁴ Section 336(b)(3) of the

²⁴ *Fifth Report and Order*, 12 FCC Rcd at 12821. These services are those other than free, over-the-air services, and could include, but are not limited to, Internet access, computer software distribution, data transmissions, teletext, interactive services, aural messages, paging services, audio signals or subscription video.

Communications Act expressly requires the Commission to apply to any ancillary or supplementary service “such of the Commission’s regulations are applicable to the offering of analogous services by any other person.” 47 U.S.C. § 336(b)(3).

Because Congress generally intended to end the differentiated legal treatment of converging technologies in the 1996 Act, NAB believes that any ancillary or supplementary services offered by DTV broadcasters should be subject to the same public interest obligations as comparable services offered by non-broadcasters. It is the type of service offered – rather than the label attached to the licensee – that should determine the type of public interest duties that apply. Accordingly, if a DTV broadcaster were to offer an Internet access service, the public interest obligations applicable to that service should be comparable to those applied to any other licensee’s Internet access service, even if a non-broadcaster. The terms of Section 336 clearly support NAB’s position.

Section 336(d) provides that a DTV licensee providing ancillary or supplementary services shall, upon renewal, “establish that all of its *program* services on the existing or advanced television spectrum are in the public interest.” 47 U.S.C. § 336(d) (emphasis added). Contrarily, with regard to non-program ancillary or supplementary services, Section 336(d) states that “[a]ny violation of the Commission’s rules applicable” to them “shall reflect upon the licensee’s qualifications for renewal of its license.” *Id.* These sections, taken together, establish that Congress intended broadcasters’ ancillary and supplementary services to be subject to the same regulations applicable to analogous services offered by other licensees, including with regard to public interest obligations. This Congressional intention “is the law and must be given